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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
Assessment and Collection of Regulatory Fees for Fiscal Year 2000	)	MD Docket No. 00-58
	)	
	)	
	)	
To: The Commission	)	

COMMENTS OF COMSAT CORPORATION

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SUMMARY

INTELSAT space stations are not licensed or regulated by the FCC as "radio facilities" pursuant to "47 C.F.R. Part 25." Accordingly, those satellites do not fall within the coverage of 47 U.S.C. § 159(g).

Nor does the newly enacted ORBIT Act require COMSAT to pay such fees in connection with INTELSAT space stations. Rather, ORBIT provides only that COMSAT must pay regulatory fees similar to those paid by "other entities providing similar services." Because ORBIT also authorizes "Level 3 Direct Access" to INTELSAT, however, COMSAT now provides services *identical* to those of all U.S. "direct access" users. Those entities provide service using the same INTELSAT space stations that COMSAT uses. Thus, ORBIT provides no basis for imposing new regulatory fees on COMSAT without also imposing such fees on all "direct access" users of INTELSAT space segment. Indeed, the FCC's proposal would also appear to require the assessment of U.S. regulatory fees upon all foreign-licensed commercial geostationary satellite systems.

In any event, it would constitute unlawfully retroactive rulemaking for the Commission to now seek to levy regulatory fees in connection with facilities that were not subject to such fees on October 1, 1999, *i.e.*, at the beginning of the current fiscal year. Even if, *arguendo*, the Commission were to assess FY 2000 regulatory fees on account of COMSAT's indirect ownership interest in the INTELSAT space stations, such an assessment should be prorated to reflect both COMSAT's 17% utilization share in INTELSAT, and the partial year in which the ORBIT Act has been in effect. Such proration would be fully consistent with established Commission precedent allowing for proration of regulatory fees under such circumstances.

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INTRODUCTION

COMSAT Corporation ("COMSAT") hereby submits comments in response to the Commission's *Notice of Proposed Rulemaking* ("*FY 2000 NPRM*") in the above-referenced docket.[1] Section 9 of the Communications Act attaches annual "regulatory fees" to all FCC-licensed facilities, including "space station[s]" licensed pursuant to "47 C.F.R. Part 25." 47 U.S.C. § 159(g). INTELSAT satellite space stations, however, are *not* FCC-licensed facilities. For this reason, the FCC has traditionally taken the position that "[r]egardless of COMSAT's interest in the INTELSAT satellites in question, they are not licensed under Title III and, therefore, not subject to regulatory fees." *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, 14 FCC Rcd 9868, ¶ 38 (1999) ("*FY 1999 Order*").

In the present proceeding, however, the Commission proposes, for the first time, to "assess regulatory fees for *all* space stations in geostationary orbit, including [INTELSAT]

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[1] *Notice of Proposed Rulemaking, In re Assessment and Collection of Regulatory Fees for Fiscal Year 2000*, FCC 00-117, MD Docket No. 00-58, at ¶¶ 16-17 (rel. April 3, 2000) ("*FY 2000 NPRM*").

satellites that are the subject of Comsat's activities, in the amount of $94,650 per satellite." *FY 2000 NPRM*, at ¶ 17 (emphasis added). The Commission also requests comment on "how the nature of Comsat services via INTELSAT may provide a basis for a different fee and state what type of fee would be appropriate to achieve parity of treatment." *Id.*

The Commission predicates its novel proposal upon two events that occurred after the *FY 1999 Order*: the decision of the D.C. Circuit in *PanAmSat v. FCC*, 198 F.3d 890 (D.C. Cir. 1999), and the enactment of new 47 U.S.C. § 642(c) as part of the ORBIT Act, Pub. L. No. 106-18, 144 Stat. 48 (2000). *See FY 2000 NPRM*, ¶¶ 16-17. The Commission's reliance upon these events, however, would be misplaced. Neither the *PanAmSat* case nor the ORBIT Act purport to subject COMSAT to any new regulatory fees not contemplated by Section 9. Rather, the decision and the Act both simply prevent COMSAT from asserting a legal immunity from fees that it might otherwise have claimed under Article XV(c) of the INTELSAT Agreement, 23 U.S.T. 3213, 3856. *See* page 18 n.8, *infra*. Nor, under *COMSAT Corp. v. FCC*, 114 F.3d 223 (D.C. Cir. 1997), could the agency lawfully impose a *new* fee on COMSAT. Accordingly, because INTELSAT space stations do not fall within the coverage of Section 9, there continues to be no basis for imposing Section 9 fees on such facilities.

Moreover, even assuming *arguendo* that such fees could be imposed against INTELSAT space stations, there is no basis for imposing them retroactively against COMSAT, or for imposing them *only* on COMSAT, which is now only one of many U.S. entities providing service using INTELSAT's facilities. At a minimum, any fees imposed must be prorated to take into account that COMSAT neither owns nor uses 100% of INTELSAT satellite capacity.

BACKGROUND

Until 1993, neither COMSAT nor any other satellite company was required to pay any annual "regulatory fee" to the FCC. In 1993, however, Congress amended the Communications Act to require all FCC *licensees*, including satellite space station licensees (as well as certain other entities not relevant here) to pay annual regulatory fees. These fees are intended to enable the FCC to recover the costs of its "enforcement activities, policy and rulemaking activities, user information services, and international activities." 47 U.S.C. § 159(a)(1). Accordingly, for each fiscal year since 1994, the FCC has promulgated an annual Notice of Proposed Rulemaking ("NPRM") seeking comment on its proposed new fee schedule. The annual NPRM is followed by an annual final Order declaring the requisite fees for that fiscal year.

The governing statute provides, in tabular form, that regulatory fees shall be assessed in relation to "Radio Facilities [including] Space Station[s] (per operation station in geosynchronous orbit) *(47 CFR Part 25)*." 47 U.S.C. § 159(g) (table) (emphasis added). The INTELSAT satellites used by COMSAT are *not* licensed by the Commission pursuant to "47 CFR Part 25," nor are they regulated by the Commission in any way. Moreover, Congress made clear in the Conference Committee Report on Section 9 that space station regulatory fees were:

> to be assessed on operators of U.S. facilities, consistent with FCC jurisdiction. Therefore, these fees will apply only to space stations directly licensed by the Commission under Title III of the Communications Act. *Fees will not be applied to space stations operated by international organizations subject to the International Organizations Immunities Act.*

H.R. Rep. No. 102-207, at 26 (1991), *incorporated by reference in* Conf. Rep. H.R. Rep. No.

103-213, at 499 (1993)).[2] Consistent with the plain language and the clear legislative history of the provision, no Section 9 regulatory fees have ever been assessed by the FCC in connection with INTELSAT space stations.

Indeed, in 1994, the inaugural year of the regulatory fees, the FCC did not even consider attempting to collect such a space station fee from COMSAT. *See Assessment and Collection of Regulatory Fees for Fiscal Year 1994*, 9 FCC Rcd 5333 (1994) (not mentioning COMSAT or INTELSAT). In 1995, in response to comments filed by COMSAT and its competitors, the Commission explained that it would *not* apply the fees to "space stations operated by international organizations subject to the International Organizations Immunities Act," *i.e.* INTELSAT. *See Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, 10 FCC Rcd. 13512, ¶ 110 (1995) (citations omitted).

In 1996, the FCC continued to recognize that "Comsat was not subject to payment of a geosynchronous satellite regulatory fee for its Intelsat and Inmarsat satellites." *Assessment and Collection of Regulatory Fees for Fiscal Year 1996, Notice of Proposed Rulemaking*, 11 FCC Rcd. 16515, ¶ 43 (1996). That year, however, without a statutory basis, the Commission sought to impose a unique "signatory fee" on COMSAT in connection with the company's role in INTELSAT and Inmarsat. *See Assessment and Collection of Regulatory Fees for Fiscal Year 1996, Report and Order*, 11 FCC Rcd. 18774, ¶ 37 (1996). The D.C. Circuit subsequently vacated the Commission's imposition of this "signatory fee." *See COMSAT Corp. v. FCC*, 114

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[2] INTELSAT is an international organization subject to the International Organizations Immunities Act, 22 U.S.C. § 288 *et seq.* *See* Exec. Order No. 11,996, 42 Fed. Reg. 4331 (1977); *see also Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, 10 FCC Rcd 13512, ¶ 110 n.30 (1995) (discussing same).

F.3d 223 (D.C. Cir. 1997). In 1997, the FCC again concluded that it lacked any basis for imposing a regulatory fee on COMSAT in connection with COMSAT's use of INTELSAT satellites. *See Assessment and Collection of Regulatory Fees for Fiscal Year 1997*, 12 FCC Rcd 17161, 17187 (1997).

In 1998, the Commission "did *not* propose any changes in the policies established in [its] earlier rule making proceedings of . . . not assessing a space station fee for Comsat activities related to Intelsat and Inmarsat satellites." Final Brief of Respondent FCC in *PanAmSat v FCC*, D.C. Cir. Docket No. 98-1408, at 9 (filed April 8, 1999) (emphasis added). Accordingly, the 1998 regulatory fees order did not repeat the Commission's "1995 discussion of *the inapplicability of the space station fee to Comsat's Intelsat and Inmarsat operations*." *Id.* at 10 (emphasis added) (discussing *Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, 13 FCC Rcd 19820 (1998) ("*FY 1998 Order*")). Instead, the Commission declined without comment to impose such fees upon INTELSAT space station operations. In 1999, the FCC again reiterated that "[r]egardless of COMSAT's interest in the INTELSAT satellites in question, they are not licensed under Title III and, therefore, not subject to regulatory fees." *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, 14 FCC Rcd 9868, ¶ 38 (1999).

Subsequently, on December 21, 1999, in a judicial proceeding of which COMSAT was not notified and in which COMSAT had no opportunity to participate, the D.C. Circuit vacated the *FY 1998 Order*, and ruled that COMSAT is not "exempt" from paying Section 9 regulatory fees. *PanAmSat v. FCC*, 198 F.3d 890 (D.C. Cir. 1999). Then, in March 2000, the ORBIT Act, Pub. L. No. 106-18, 144 Stat. 48 (2000), was enacted by the 106th Congress. In pertinent part, that statute provides that:

> (c) PARITY OF TREATMENT- Notwithstanding any other law or executive agreement, the Commission shall have the authority to impose *similar regulatory fees on the United States signatory which it imposes on other entities providing similar services.*

47 U.S.C. § 642(c) (enacted March 17, 2000) (emphasis added).

Two weeks after ORBIT was enacted, the FCC released the *FY 2000 NPRM* that is the subject of the present proceeding. In the *NPRM*, the Commission proposes, for the first time, to "assess regulatory fees for *all* space stations in geostationary orbit, including [INTELSAT] satellites that are the subject of Comsat's activities, in the amount of $94,650 per satellite." *Notice of Proposed Rulemaking, In re Assessment and Collection of Regulatory Fees for Fiscal Year 2000*, FCC 00-117, MD Docket No. 00-58, at ¶ 17 (rel. April 3, 2000) ("*FY 2000 NPRM*") (emphasis added). The Commission also requests comment on "how the nature of Comsat services via INTELSAT may provide a basis for a different fee and state what type of fee would be appropriate to achieve parity of treatment." *Id.*

These comments respond to the Commission's proposals.

DISCUSSION

I. INTELSAT Space Stations Are Not Subject To Regulatory Fees Under Section 9, Because INTELSAT Space Stations are Neither Licensed Nor Regulated Under Part 25 of the Commission's Rules.

Quoted in full, Section 9(g) imposes an annual regulatory fee in connection with "Space Station[s] (per operational station in geosynchronous orbit) *(47 CFR Part 25)*." (emphasis added). The space station fee is one of several fees imposed on various types of "Radio Facilities." 47 U.S.C. § 159(g) (table). INTELSAT space stations are not subject to this fee

because those satellites are not licensed or otherwise governed by Part 25 of the Commission's Rules. Indeed, INTELSAT space station "radio facilities" are not subject to U.S. jurisdiction at all. Accordingly, the Commission has never before sought to apply Section 9 regulatory fees to INTELSAT space stations.

A. INTELSAT Space Stations Are Not Licensed by the FCC.

It is beyond dispute that no INTELSAT space station has ever been licensed by the FCC, pursuant to Part 25 or otherwise. Nor has the FCC ever even suggested that INTELSAT or COMSAT was required to obtain an FCC license to operate INTELSAT space stations. Rather, since the inception of the space station licensing rules now codified in Part 25, Subpart B, the FCC has always made clear that those rules have no application to INTELSAT satellites.[3]

For this reason, COMSAT's applications with respect to INTELSAT space stations are not filed on FCC Form 312, as would be required by Section 25.114 if Part 25 were applicable,

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[3] Part 25 primarily governs application requirements and technical standards for domestic satellite systems and "separate" international systems. *See generally Establishment of Satellite Systems Providing International Communications*, 101 FCC 2d 1046, ¶ 4 (1985) (creating the international satellite space station application and licensing rules now codified as amended at Part 25, Subpart B, to "establish regulatory policies to consider applications for satellite systems providing international communications services *separate from INTELSAT*") (emphasis added), *modified in part on recon.*, 61 Rad. Reg. 2d (P&F) 649 (1986), *further recon. denied*, 1 FCC Rcd 439 (1986); *id.* ¶ 232 (requiring "*separate system* applicants" to establish their legal qualifications to hold space station licenses on FCC Form 430); *see also id.* ¶¶ 230, 237 (establishing the space station technical standards now codified as amended at Part 25, Subpart C to ensure that "certain minimal efficiency criteria ... be applied *to separate systems that we authorize*") (emphasis added); *id.* ¶ 244 (adopting "for the separate systems" a 2° spacing requirement); *id.* ¶ 248 (applying technical performance standards "to the separate international satellite systems"). *See also Establishment of Domestic Communications Satellite Facilities by Non-governmental Entities*, 22 FCC 2d 86 (1970) (establishing similar rules for U.S. domestic satellite systems).

and the information provided in those applications is not governed by Sections 25.114 and 25.140. Most importantly, **COMSAT does not receive a license from the FCC** pursuant to Section 25.117 in connection with any INTELSAT space stations.

When the full text of the relevant statutory provision is taken into account, the legislative report language addressing that provision becomes crystal clear: Congress intended that space station regulatory fees "be assessed on operators of U.S. facilities, consistent with FCC jurisdiction. Therefore, these fees will apply only to space stations directly licensed by the Commission under Title III of the Communications Act." H.R. Rep. No. 102-207, at 26 (1991), *incorporated by reference in* H.R. Conf. Rep. No. 103-213, at 499 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1088, 1188.[4]

B. INTELSAT Space Stations Are Not Regulated Under Part 25 of the Commission's Rules.

The license application and waiver request recently filed by INTELSAT's proposed private successor entity "Intelsat LLC" makes abundantly clear the fact that INTELSAT's space stations have never been licensed or regulated by the Commission's "Part 25" Rules. *See Intelsat LLC Application for C-Band and Ku-Band Global Satellite System*, File Nos. SAT-A/O-20000119-0002/18; SAT-AMD-20000119-0029/41; SAT-LOA-20000119-00019/28, at 38-69 (filed Jan. 18, 2000). Specifically, in that filing, INTELSAT LLC notes that INTELSAT does not (and has never been required to) comply with:

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[4] Significantly, Section 8 of the Act, which provides for the collection of space station *application* fees, contains no reference to Part 25. *See* 47 U.S.C. § 158(g). Thus, the fact that COMSAT is subject to Section 8 fees when it files applications does not suggest or imply that it is also subject to Section 9 regulatory fees on unlicensed INTELSAT space station facilities.

- the 2° spacing requirements of 47 C.F.R. § 25.140(b). *See id.* at 48-51.
- the staggered C-band frequency plan set forth at 47 C.F.R. § 25.211(a). *See id.* at 52-53, 67-68.
- the power density limits set forth at 47 C.F.R. § 25.211(c-d). *See id.* at 56-57.
- the limitation on unused orbital slots contained in 47 C.F.R. § 25.140(f). *See id.* at 59-61.
- the restriction on the use of certain frequencies in the extended C-band set forth at 47 C.F.R. § 25.202(a). *See id.* at 61-63.
- the rule set forth at 47 C.F.R. § 25.202(g) that TTC&M functions for U.S. satellite systems be conducted "at either or both edges of the allocated band(s)." *See id.* at 64.
- the requirement of 47 C.F.R. § 25.210(a) that space stations operating in the C-band use linear polarization rather than circular polarization. *See id.* at 64-65.
- the requirement that space stations be capable of changing transponder flux densities by ground command contained in 47 C.F.R. § 25.210(c). *See id.* at 66.
- the regulations setting a minimum acceptable cross-polarization isolation set forth at 25.210(i). *See id.* at 66-67.
- the requirement that space stations remain within 0.05° of their assigned orbital longitude set forth at 47 C.F.R. § 25.210(h). *See id.* at 68.
- the dual polarization requirement set forth in 47 C.F.R. § 25.210(e)(1). *See id.* at 68-69.

In view of the fact that INTELSAT space stations were never subject to any of these rules, there is no basis for imposing Section 9 fees in connection with the promulgation or enforcement of these (or other) inapplicable rules set forth in "47 C.F.R. Part 25." 47 U.S.C. § 159(g) (table). Rather, regulatory fees may be imposed only to recover costs that the Commission incurs in regulating the facilities that are subject to its jurisdiction. See 47 U.S.C. § 159(a)(1); *Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, 14 FCC Rcd 9868, ¶ 4 (1999). The Commission, however, incurs no cost (apart from the costs that it already

recovers through Section 8 application fees and Section 9 bearer circuit fees which COMSAT already pays) in regulating INTELSAT space stations as "radio facilities," precisely because those space stations are *not* "directly licensed by the Commission under Title III of the Communications Act." In contrast, for U.S.-licensed radio facilities, the Commission incurs cost both in processing applications and in regulating the facilities on an ongoing basis—for example, in promulgating the rules in Part 25 relating to the legal, financial, and technical qualifications of U.S. space station operators.

Largely due to the activities of COMSAT's larger (and largest) competitor PanAmSat Corporation, the Commission *does* incur some cost in overseeing COMSAT's Signatory activities in INTELSAT. *See Hughes Communications, Inc. & Anselmo Group Voting Trust/PanAmSat Licensee Corp.*, 12 FCC Rcd 7534, at ¶ 10 (1997) (noting that PanAmSat's now-parent corporation, Hughes Communications, Inc., "itself has sharply criticized PanAmSat for filing 'vexatious pleadings,'" and further noting "that PanAmSat has opposed virtually every attempt by Comsat to participate in INTELSAT satellite procurement, to change rates, or to relax regulatory burdens."). Nonetheless, these costs are not incurred in consequence of the Commission's regulation of INTELSAT's "radio facilities" pursuant to "47 C.F.R. Part 25." Accordingly, they may not be recovered through Section 9 regulatory fees. Moreover, the D.C. Circuit has held that the FCC lacks authority to recover such costs by imposing an extra-statutory "Signatory fee" only upon COMSAT. *See COMSAT Corp. v. FCC*, 114 F.3d 223 (D.C. Cir. 1997). The Commission may not revive the unlawful "Signatory Fee" by disguising it as an equally unlawful regulatory fee.

Moreover, it is of no consequence that COMSAT's *ownership structure* was formerly regulated under Part 25 of the Commission's Rules (47 C.F.R. §§ 25.501-25.531). By its plain

terms, Section 9 of the Communications Act authorizes the Commission to impose annual regulatory fees only to recoup the costs of regulating "Radio Facilities," including "Space Station[s] (per operational station in geosynchronous orbit) (47 CFR Part 25)." 47 U.S.C. § 159(g). The Act thus contemplates that regulatory fees be assessed in direct relation to an entity's number of space stations licensed and/or regulated under Part 25. The Commission's regulation of COMSAT's ownership structure, although formerly effected via "47 CFR Part 25," does not constitute regulation of any "radio facilities" or of any "operational [space] station in geosynchronous orbit." *Id.* Accordingly, such regulation of ownership structure never provided any basis for the Commission to impose space station regulatory fees upon INTELSAT's unlicensed and unregulated space station radio facilities.

Moreover, following the enactment of ORBIT, the FCC no longer regulates COMSAT's ownership structure under 47 C.F.R. Part 25 at all. Rather, ORBIT has now repealed Sections 303 and 304 of the Communications Satellite Act of 1962. *See* 47 U.S.C. § 645(1) (enacted March 17, 2000) (repealing, *inter alia*, 47 U.S.C. §§ 733, 734). Accordingly, regardless of their former status, the FCC's "Part 25" regulations implementing those repealed statutory provisions are now a nullity, and can provide no basis for the assessment of Section 9 regulatory fees. Today, not a single FCC Rule codified in "47 C.F.R. Part 25" applies to COMSAT.

C. INTELSAT Space Stations Are Non-U.S. Facilities Not Subject to U.S. Jurisdiction.

INTELSAT space stations are not U.S. facilities. Rather, those space stations are expressly treated as *non*-U.S. facilities and are not licensed by the FCC. As the Commission explained in its *DISCO-II* proceeding, "the phrase 'non-U.S.' satellite system or operator means

one that does not hold a commercial space station license from the Commission. By contrast, a 'U.S.' satellite system or operator means one whose space station is licensed by the Commission." *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Service in the United States*, 12 FCC Rcd 24094, 24098 n.6 (1997) ("*DISCO-II Order*") *modified on recon.*, FCC 99-325, 1999 FCC LEXIS 5448 (Oct. 29, 1999), *appeal pending*, No. 98-1011 (D.C. Cir.); *see also INTELSAT LLC Application for C-Band and Ku-Band Global Satellite System*, File Nos. SAT-A/O-20000119-0002/18; SAT-AMD-20000119-0029/41; SAT-LOA-20000119-00019/28, at 43-44 (filed Jan. 18, 2000) (noting that the INTELSAT system, "because of its international status, was not . . . subject to Commission jurisdiction or required to comply with the agency's satellite rules and regulations.").

Thus, for regulatory fee purposes, there is no meaningful distinction between INTELSAT space stations and foreign-licensed space stations. Indeed, this point is underscored by the *FY 2000 NPRM* itself, which proposes to "assess regulatory fees for all space stations in geostationary orbit, including satellites that are the subject of Comsat's activities. . . ." *FY 2000 NPRM*, ¶ 17. Were the Commission to follow through on this proposal, then it would need to assess regulatory fees on each of the nearly 200 commercial geostationary communications satellites currently orbiting the earth,[5] and not merely the 46.5 U.S.-licensed satellites plus 17

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[5] *Philips Satellite Industry Directory* 17-234, 279-413 (21st ed. 1999) (setting forth complete information about each of these satellites and their operators).

INTELSAT satellites.[6] And indeed, it is difficult to fathom any reason why INTELSAT should pay regulatory fees while foreign-licensed satellites should not pay such fees.

In this regard, it is of no consequence that some INTELSAT space stations *serve* the United States. Rather, a substantial number of foreign-licensed geostationary satellite space stations also serve the United States. For example, the Commission recently issued a blanket authorization prospectively allowing Telesat Canada's Canadian-licensed ANIK E1 and ANIK E2 satellites (located at the 111.1° W.L. and 107.3° W.L. orbital locations, respectively) to communicate with U.S.-licensed earth stations without any additional Commission action. *Telesat Canada*, DA 99-2752, 1999 WL 1124071, 1999 FCC LEXIS 6301 (Int'l Bur. Dec. 9, 1999). Similarly, New Skies Satellites' five Netherlands-licensed geostationary satellites also recently received FCC permission to serve more than 100 earth stations located in the United States for a three-year term. *New Skies Satellites, N.V.*, 14 FCC Rcd 13003 (1999). Numerous other foreign-licensed satellites also have been authorized to serve the United States directly.[7] Yet the Commission has never construed Section 9 to impose regulatory fees on foreign-licensed satellites.

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[6] *See FY 2000 NPRM*, Attachment C, at 34 (reflecting that a total of 63.5 geostationary space stations—including INTELSAT space stations—were included in the FCC's computation of the pro-rata fees).

[7] *See, e.g.*, *SatCom Systems, Inc.*, 14 FCC Rcd 20798 (1999) (authorizing the Canadian-licensed MSAT-1 geostationary satellite located at 106.50° W.L. to serve the United States directly); *Televisa International, LLC.*, 13 FCC Rcd 10074 (1997) (authorizing the Mexican-licensed Solidaridad II satellite located at 113° W.L. to provide direct-to-home television service in the United States); *Vision Accomplished, Inc.*, 11 FCC Rcd 3716 (Int'l Bur. 1995) (authorizing the Japan-licensed JCSAT-1 and JCSAT-2 satellites to provide service directly to earth stations in Hawaii); *IDB Worldcom Services, Inc.*, 10 FCC Rcd 7278 (Int'l Bur. 1995) (authorizing the Russian-licensed "Statsionar 10" and "Statsionar 11" satellites to serve U.S. earth stations).

Moreover, unlike the aforementioned foreign-licensed satellites, at least four INTELSAT space stations *do not*—and cannot—serve the United States. Specifically, the "INTELSAT 602" satellite at 62.0° E.L., the "INTELSAT 604" satellite at 60.0° E.L., the "INTELSAT 704" satellite at 66.0° E.L., and the "INTELSAT 804" satellite at 64.0° E.L., each are located in the "Indian Ocean Region" of the earth (between Africa and India), from which it is not possible to "see"—much less to serve—the North American continent. *See INTELSAT Space Segment: Capacity-At-A-Glance Web Site*, <http://www.intelsat.int/coveragemaps/> (visited April 21, 2000) (providing coverage maps for each INTELSAT satellite). Accordingly, none of INTELSAT's four "Indian Ocean Region" satellites have ever provided any service to or from the United States.

For these reasons, there is no basis for regulatory fees on INTELSAT space stations that would not apply equally to "all space stations in geostationary orbit," *FY 2000 NPRM*, ¶ 17, including foreign-licensed space stations. Indeed, the Commission's nexus to the four INTELSAT space stations that do not serve the United States is substantially more attenuated than its nexus to the many foreign-licensed satellites that actually serve the United States. The Commission, however, has never construed Section 9 to impose regulatory fees on foreign-licensed satellites, nor does it propose to do so now. Accordingly, it may not impose such fees on the non-U.S.-licensed INTELSAT system.

D. It is of No Consequence That DBS Space Stations Are Now Licensed Under Part 100 Rather Than Part 25.

Domestic DBS space stations are subject to space station regulatory fees even though such facilities are now licensed under Part 100—rather than Part 25—of the Commission's Rules. *See FY 2000 NPRM*, Attachment F, at 51. This fact, however, has no bearing on the question presented here. INTELSAT space stations are not now, and never were, within the ambit of Part 25 of the Commission's Rules. Domestic DBS space stations, in contrast, were licensed and regulated under Part 25 in 1993, when Section 9 was enacted.

At that time, both domestic *and* international satellites were licensed under Part 25 of the Commission's Rules. Accordingly, DBS satellites were required to pay the same regulatory fees imposed on all other geostationary satellite space stations licensed under "47 CFR Part 25." *See Public Notice No. 43536, Space and Earth Station Regulatory Fees*, 75 Rad. Reg. 2d (P&F) 562, at 2 n.1 (June 20, 1994) (noting that Section 9 fees must be paid in connection with "*[d]omestic and international satellites*, positioned in orbit to remain approximately fixed relative to the earth, authorized to provide communications between satellites and earth stations on a common carrier or private carrier basis *in accordance with Section 25.120(d)*") (citing 47 C.F.R. § 25.120(d)) (emphasis added); see also *Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, 10 FCC Rcd 13512, ¶ 108 (1995) ("Geosynchronous space stations are *domestic and* international satellites positioned in orbit to remain fixed relative to the earth. *They are authorized under Part 25 of the Commission's Rules* to provide communications between satellites and earth stations on a common carrier and/or private carrier basis.") (emphasis added).

In December, 1995, the FCC for the first time separated the space station licensing procedure for domestic DBS satellites from the licensing procedure applicable to other geostationary space stations. *See Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712 (1995), *aff'd, DirecTV v. FCC*, 110 F.2d 816 (D.C. Cir. 1997) (enacting 47 C.F.R. §§ 100.17 *et seq.*).[8] Because no one ever suggested that this ministerial change in the FCC's numerology could possibly relieve licensed DBS satellites of the regulatory fee obligation that Congress had imposed upon them by statute two years earlier, the FCC simply noted in every subsequent annual regulatory fees order that the statutory term "Space Stations (per operational station in geosynchronous orbit) (47 CFR Part 25) also includes Direct Broadcast Satellite Service (per operational station) (47 CFR Part 100)." *Assessment and Collection of Regulatory Fees For Fiscal Year 1996*, 11 FCC Rcd 18774, Appendix E (1996), *vacated in other respects, COMSAT Corp. v. FCC*, 114 F.3d 223 (D.C. Cir. 1997); *accord FY 2000 NPRM*, Attachment F, at 51 (same).

Thus, Congress clearly always intended for space station regulatory fees to apply to domestic DBS satellites. And, of course, such fees *have* always applied to such satellites. In both of these respects, DBS satellites stand in contradistinction from INTELSAT satellites.

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[8] As early as 1982, the Commission created Part 100 and had codified in that Part certain rules applicable to the DBS service. *See Inquiry into the Development of Regulatory Policy In Regard to Direct Broadcast Satellites*, 90 FCC 2d 676 (1982), *recon. denied*, 94 FCC 2d 741 (1983), *vacated in part, National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984). Until 1995, however, these rules did not encompass the licensing of space stations, which remained within the purview of Part 25.

II. Neither the *PanAmSat* Case Nor the ORBIT Bill Purports To Impose New or Unique Regulatory Fees on COMSAT.

Neither the *PanAmSat* case nor the ORBIT Act purport to subject COMSAT to any new regulatory fees not contemplated by Section 9. Rather, both simply prevent COMSAT from asserting a legal immunity from fees that it might otherwise have claimed under Article XV(c) of the INTELSAT Agreement, 23 U.S.T. 3213, 3856. Accordingly, because INTELSAT space stations clearly do not fall within the coverage of Section 9, neither *PanAmSat* nor ORBIT provides any new basis for imposing Section 9 fees on such facilities.

A. Neither PanAmSat Nor ORBIT Alters the *Coverage* of 47 U.S.C. § 159.

In the *PanAmSat* case, the D.C. Circuit rejected the idea "that the [regulatory fees] statute compelled an *exemption* for COMSAT." *PanAmSat v. FCC*, 198 F.3d at 896 (emphasis added). But far from determining that COMSAT must pay Section 9 fees on INTELSAT space stations, the Court readily acknowledged that it was not defining "the *coverage* of the space station category in § 9. . . ." *Id.* (emphasis added). Accordingly, the *PanAmSat* case does not foreclose the Commission from adhering to its long-standing conclusion that INTELSAT space stations lie outside the *coverage* of Section 9.

Analogously, the ORBIT Act authorizes the FCC only "to impose similar regulatory fees on [COMSAT] which it imposes on other entities providing similar services." 47 U.S.C. § 642(c) (enacted Mar, 17, 2000) (emphasis added). It does not authorize the Commission to impose any new or unique fees on COMSAT that it does not impose on any other user of any non-licensed facilities. Nor does it purport to expand the coverage of Section 9 in any way. As such, it does no more than codify the *PanAmSat* court's holding that COMSAT is not exempt, by

virtue of its Signatory status, from liability for regulatory fees that it would otherwise be required to pay.[9]

B. ORBIT Prohibits the FCC From Imposing New Fees on COMSAT Unless It Imposes the Same Fees on Direct Access Users "Providing Similar Services."

Section 641(a) of the ORBIT Act authorizes multiple "users or providers of telecommunications services . . . to obtain direct access to INTELSAT telecommunications services and space segment capacity through purchases of such capacity from INTELSAT." 47 U.S.C. § 641(a) (enacted Mar. 17, 2000); *see also Direct Access to the INTELSAT System*, 14 FCC Rcd 15703 (1999) (same). Under this regimen of "Level III Direct Access," COMSAT is now just one of many "resellers" of INTELSAT space segment in the United States. *See Direct Access Order*, 14 FCC Rcd 15703, at ¶ 157 (asserting that COMSAT merely "obtain[s] and resell[s INTELSAT] space segment to U.S. customers."). Moreover, all such non-Signatory "resellers"—and INTELSAT itself—may now offer *identical INTELSAT services* to those provided by COMSAT, using the very same satellites. *See id.* at ¶¶ 31-34 (asserting that Level III direct access provides U.S. users and providers with "[t]he benefits of greater flexibility and

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[9] The redundancy between ORBIT and the D.C. Circuit's *PanAmSat* decision is explained by the fact that the ORBIT provision at issue is a carryover from a previous satellite privatization Bill (105th Cong., H.R. 1872, § 643(c)) which originally passed the House in 1998, more than a year before *PanAmSat* was decided. In 1998, when the provision was first introduced, the D.C. Circuit had recently struck down an FCC attempt to impose a "Signatory Fee" on COMSAT. *See COMSAT Corp. v. FCC*, 114 F.3d 223 (D.C. Cir. 1997). Following that decision, it was far from clear that COMSAT was still required to pay *any* regulatory fees. In 1999, with ORBIT still unenacted, the *PanAmSat* court settled this still-open question, by holding that COMSAT is not "exempt" by virtue of its Signatory status from paying regulatory fees that it would otherwise be subject to pay. *PanAmSat Corp.*, 198 F.3d at 892-93; *see also* page 20, *infra* (discussing the regulatory fees which COMSAT must pay). Four months later, the enactment of ORBIT codified the same principle.

control" in selecting which INTELSAT services to provide or use). In short, under the "direct access" program codified in ORBIT, COMSAT is neither a satellite licensee nor a satellite operator. Accordingly, there is no basis for holding COMSAT responsible for INTELSAT's regulatory fees while not holding other providers of INTELSAT space segment that provide identical services equally responsible. *Cf. COMSAT Corp., Petition for Partial Relief From the Current Regulatory Treatment of Comsat World Systems' Video and Audio Services*, 12 FCC Rcd 12059, ¶ 41 (1997) (noting that "[r]esellers acquiring [INTELSAT] capacity at cost [are] able to compete with Comsat and its competitors. . . .").

C. COMSAT Already Pays the Same Regulatory Fees Paid By Other Entities That Provide Similar Services Or Hold Similar Licenses.

The ORBIT Bill refers to "similar services," and not to "facilities." As an international common carrier, COMSAT is already fully subject to the same international bearer circuit regulatory fees *on its services* that are assessed against all satellite operators. *See Assessment and Collection of Regulatory Fees for Fiscal Year 1999*, 14 FCC Rcd 9868, ¶¶ 37, 40 (1999). Thus, in FY 1998, COMSAT paid regulatory fees in connection with 53,957 international bearer circuits, *id.* ¶ 37, for a total of $323,742.[10] The overwhelming majority of the international bearer circuits for which COMSAT paid fees were used to provide COMSAT's INTELSAT services to U.S. customers and users. Accordingly, to the extent that COMSAT uses INTELSAT facilities to provide "similar services" to those provided by other carriers, COMSAT *already* pays similar

[10] The regulatory fee for international bearer circuits was $6.00 per circuit in FY 1998. 47 C.F.R. § 1.1156 (1998). For FY 2000, it will be $7.00 per circuit.

regulatory fees to those carriers. The statute does not require COMSAT to pay any additional fees that relate to the *facilities* that it uses; it refers only to the *services* that it provides.

Similarly, the *PanAmSat* case, cited in the *FY 2000 NPRM*, held that COMSAT is not "exempt" by virtue of its Signatory status from paying any Section 9 regulatory fees that it would otherwise be obligated to pay. *See PanAmSat*, 198 F.3d at 895-96. But COMSAT has never claimed any special "exemption" from paying such fees. Rather, COMSAT must (and does) pay Section 9 fees in connection with its U.S.-licensed space stations, *i.e.*, the COMSTAR and MARISAT satellites. COMSAT also pays Section 9 fees on each of its U.S.-licensed earth stations, including those that access INTELSAT satellites. *Id.* In FY 1998, "COMSAT paid regulatory fees for two geostationary space stations, 142 earth stations, and 53,957 international bearer circuits for a total of $585,172." *Id.* That same year, COMSAT also paid Section 8 application fees totaling $185,780. In FY 1999, COMSAT paid $690,620 in Section 9 regulatory fees, plus an additional $57,604 in Section 8 application fees. In FY 2000, not counting the INTELSAT space stations at issue, COMSAT expects to pay Section 9 regulatory fees of roughly $717,875. These fees are completely consistent with those paid by other entities that provide similar services using similar facilities.

Indeed, if the *PanAmSat* case has any relevance whatsoever to the present proceeding, such relevance pertains only to the question of whether COMSAT should continue to pay international circuit bearer fees in connection with INTELSAT service now provided not by COMSAT, but instead by non-Signatory "direct access" users. Plainly, COMSAT should not. In *PanAmSat*, the D.C. Circuit affirmed the Commission's conclusion that Section 9

international circuit bearer fees to be paid by all providers of satellite service, without regard to whether or not the provider is classified for other purposes as a common carrier. *See PanAmSat*, 198 F.3d at 897-98. Accordingly, COMSAT's international bearer circuit fees should be reduced prospectively to reflect the extent to which INTELSAT service is now provided in the United States by entities other than COMSAT.

III. Any Fees Imposed Must Be Properly Prorated.

For the reasons discussed above, any imposition of Section 9 regulatory fees on COMSAT in connection with non-licensed INTELSAT space station facilities would be unlawful and unwarranted. If, however, the Commission nonetheless decides to impose such fees, it should, at a minimum, apply appropriate proration to avoid manifest injustice.

A. Any Fees Imposed Must Reflect COMSAT's Seventeen Percent Utilization Share in INTELSAT.

INTELSAT is an international cooperative owned and operated by 143 Signatories, of which COMSAT is only one. Even as the single Signatory with the highest INTELSAT utilization share, COMSAT uses only 17.01% of the total transponder capacity of the INTELSAT system. Moreover, this percentage is likely to decline precipitously as "direct access" to INTELSAT is implemented under the ORBIT Bill. Accordingly, any Section 9 regulatory fees that might be applied to COMSAT should be pro-rated to reflect this share. *Cf. Columbia Communications Corp. Partial Waiver of Its Regulatory Fee Payment for Two Geostationary Space Stations*, FCC 98-299, 1999 FCC LEXIS 260, 1999 WL 22920, at ¶ 2 (Jan. 22, 1999) (assessing only 50% of the annual space station regulatory fee against Columbia Communications Corp. in connection with two Columbia-licensed space stations whose

transponder capacity was shared with NASA under a long-term agreement).[11]

B. No Fees Imposed Should Be Applied Retroactively to the Portion Of FY 2000 Preceding ORBIT's Enactment.

As a matter of long-standing and consistently applied Commission practice, regulatory fees are paid only by those entities that fell within the coverage of Section 9 on or before *October 1 of the prior calendar year. See, e.g., Public Notice, FY 1999 International and Satellite Services Regulatory Fees*, at 3 (Aug. 2, 1999) (setting October 1, 1998 cut-off date for who must pay FY 1999 fees). Because the ORBIT Bill was not yet in force on October 1, 1999, INTELSAT space stations clearly did not fall within the coverage of Section 9 as of October 1, 1999. Courts would strictly scrutinize any FCC rule purporting to apply the new statute

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[11] For present purposes, COMSAT assumes that any proration would be effected on the basis of COMSAT's utilization share of INTELSAT rather than its share of equity in INTELSAT. This assumption is predicated upon the FCC's stated position that COMSAT's equity interest in INTELSAT does not constitute "ownership" of the U.S. portion of INTELSAT. *See* Brief For Respondents FCC in *COMSAT Corp. v. FCC*, Docket No. 99-1412, at 39-40 & n.30 (D.C. Cir.) (filed Feb. 15, 2000) (stating that "Comsat does not even own the [INTELSAT] satellites," because "[t]he [INTELSAT] treaty plainly places ownership in Intelsat") (citing Agreement Relating to the International Telecommunications Satellite Organization, Art. V, Aug. 20, 1971, 23 U.S.T. 3813, 3822, TIAS No. 7532; Operating Agreement Relating to the International Telecommunications Satellite Organization Art. 3(b), Aug. 20, 1971, 23 U.S.T. 4091, 4094). Under the Commission's current theory of INTELSAT ownership, there would appear to be no basis for imputing *any* portion of INTELSAT's putative regulatory fees to COMSAT, a mere "passive investor." In case, however, the Commission were to choose to prorate any fees on the basis of COMSAT's equity interest in INTELSAT rather than its utilization share, COMSAT hereby notifies the Commission that its equity interest in INTELSAT is currently 20.42%.

retroactively. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (strong presumption against retroactive rulemaking).

Moreover, if the Commission decides to impose a fee notwithstanding that INTELSAT space stations clearly were not within the coverage of Section 9 on October 1, 1999, the Commission should, at the very least, prorate the fee to reflect only the portion of FY 2000 during which the ORBIT Act was actually in effect.[12] Here, FY 2000 runs from October 1, 1999 to September 30, 2000. *See Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, 9 FCC Rcd 5333, ¶ 48 (1994) (noting that "October 1 is the first day of the fiscal year"), *modified in other respects*, 10 FCC Rcd 12759 (1995), *and clarified*, FCC 97-214, 1997 FCC LEXIS 3684 (July 15, 1997). Because ORBIT was not enacted until March 17, 2000, COMSAT should be required to pay fees in FY 2000 for, at most, the six-and-one half months of the fiscal year that still remain after that date.

In sum, if regulatory fees are imposed on INTELSAT space stations for FY 2000, COMSAT should be liable for no more than 17.01% of INTELSAT's 17 space stations, and for no more than the six-and-one-half months of the fiscal year that ORBIT was in effect. Prorated thusly, COMSAT would be required to pay an amount equal to *1.57 times* the FY 2000 regulatory fee that would be charged for *a single* satellite space station (*i.e.*, a total of $148,253).

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[12] By its own terms, ORBIT provides that "the Commission *shall* have the authority to impose . . . regulatory fees" on COMSAT. The word "shall" connotes prospective—rather than retrospective—application. *See* WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1666 (unabridged 2d ed. 1971) (defining "shall" as "an auxiliary used in formal speech to express *futurity*, [*inter alia*] . . . in laws and resolutions") (emphasis added). Thus, the statute provides no basis for retrospective application of fees to time periods prior to its enactment.

CONCLUSION

For the foregoing reasons, the Commission should adhere to its well-established interpretation of 47 U.S.C. § 159(g), and should thereby refrain from imposing regulatory fees on INTELSAT space stations. Nothing in the *PanAmSat* case or the ORBIT Act affects this conclusion. If, however, *arguendo*, the Commission were to assess FY 2000 regulatory fees on COMSAT in connection with INTELSAT space stations, such an assessment should be properly prorated to reflect both COMSAT's 17% utilization share in INTELSAT, and the partial year in which the ORBIT Bill was in effect.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing comments of COSMAT Corporation was served by hand this 24th day of April, 2000, on:

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